

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139 (JFK)
.
W.R. GRACE & CO., et al., .
5414 USX Tower Building
Pittsburgh, PA 15222
Debtors. .
April 22, 2002
10:05 a.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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1 will result in an appeal because Mr. Barbanti cannot --

2 THE COURT: Look, no matter which way I do this,
3 folks, you all say you're going to appeal. No matter what way
4 I do it, you're going to appeal. So, fine, appeal. I don't
5 care. Let's at least get the issue determined so you have
6 something to appeal on. I mean it would make a lot more sense
7 that we get the fundamentals down and then worry about whether
8 you're going to file an appeal.

9 MR. SCOTT: Well, as I say, the issues I think will be
10 before the Court at the next Omnibus hearing. There will be
11 apparently -- a claim has already been filed. There will be a
12 motion to strike the proofs of claims and there will be a
13 motion to lift stay and to transfer. The Court will make
14 rulings and then the litigation process will I guess take its
15 natural course. But what I was trying to do was to expedite a
16 hearing on the liability issue and put this Court in a position
17 where it could avoid the certification issue and Grace's
18 proposal I think just cast the Court right into the --

19 THE COURT: Number one --

20 MR. SCOTT: It cast the Court into the certification
21 issue, I'm sorry.

22 THE COURT: Number one, I don't know that I either
23 can or should avoid the certification issue at the appropriate
24 time. The problem is I think it's premature. There is no
25 point going to certification issues if, in fact, there isn't

1 going to be any liability determination. If there is going to
2 be a liability determination, then I think we need to look at
3 the scope. You've already got the class action certified in
4 the state court. That's not going anywhere. So I'm not sure
5 why at this point that whole thing has to come into this court.
6 And if it does, okay, do it that way, I don't really care. I
7 want to get to the liability side so we can see --

8 MR. SCOTT: I do too.

9 THE COURT: -- what it is that this debtor might be
10 subjected to and to whom it may owe and what at some point.

11 MR. SCOTT: I agree, Your Honor.

12 But I guess the point I would like to leave the Court
13 with is, classes are typically certified and almost invariably
14 uncertified. Certified on the liability issue and not on the
15 damages issue. The Court is doing it the other way around.
16 One of the reasons that the Washington court certified the
17 Barbanti case is because trial of the liability issue could not
18 be done even in Washington by a single claimant or a few
19 claimants standing alone. That is as true in Delaware as it is
20 -- or Pittsburgh as it is in Washington, and so rather than
21 avoiding an issue and getting swiftly to the liability trial, I
22 fear we'll really run sort of run into a procedural nightmare
23 that will set off --

24 THE COURT: But I think what you're saying is simply
25 that whatever the claimants, and I don't know who they are that

1 the debtors have picked, may not be able to afford the cost of
2 the litigation on the science side. Is that what you're
3 telling me? Because if that's the case --

4 MR. SCOTT: That at least, yes.

5 THE COURT: All right. If that's the case, you
6 represent a whole lot of plaintiffs who can join in this action
7 simply by filing a proof of claim. So if you want more people
8 to share that load, it seems to me that the opportunity is
9 here. You file a proof of claim. And we still get to the
10 common issue trial.

11 Pardon me. Somebody on the phone, I don't know if
12 you're writing or typing or what you're doing next to your
13 microphone, but it's coming across here and it's very difficult
14 to hear. Could you please do whatever it is, maybe put your
15 phone on mute or something until you're ready to speak.

16 Thank you.

17 MR. SCOTT: And that is probably one of the
18 procedures that happens. Mr. Barbanti, who is a representative
19 of the State of Washington, will file a class proof of claim,
20 and off we go.

21 THE COURT: Well, I still think that we're putting
22 the car before the horse in this instance. I truly do. And
23 I'm not sure why we want to complicate what should be, I think,
24 a pretty much cut and dried battle of experts on the liability
25 side by adding to it the issues of a class certification. I'm

1 really not.

2 Now, I'm not saying that the experts are going to
3 agree. I don't mean to minimize the complexity of the
4 evidence. But I'm not sure that we have to go there yet. And
5 why do we want to if, in fact, it turns out that there is no
6 proof of liability, we're not going anywhere with class
7 certifications. And if there is liability, we've got a whole
8 different horse to deal with.

9 MR. SCOTT: Your Honor, it is because individuals
10 with small claims are powerless to litigate a liability issue,
11 which in this case will be in the neighborhood of a half a
12 million dollars of expert witness fees only. That is the
13 circumstances under which classes are typically certified and a
14 failure to certify a class, the parties are powerless to pursue
15 their claims absent certification, isn't -- gives them an
16 automatic right of appeal. So we're --

17 THE COURT: Number one, I don't know that there is
18 going to be an automatic right of appeal when it's
19 discretionary in a Bankruptcy Court. I haven't seen any cases
20 that say the class certifications are mandatory in Bankruptcy
21 Courts.

22 Number two, in Bankruptcy Courts typically almost
23 everyone who has a claim, and obviously there are exceptions
24 when you paint with this broad a brush, but most people who
25 file claims have small claims. They bear the burden of that

1 litigation. There is an Unsecured Creditors Committee already
2 appointed who can handle this litigation. They're there to
3 deal with issues like property damage claims. They have
4 counsel. They can hire experts. This group of people can very
5 well be represented by that Unsecured Creditors Committee and I
6 don't see how they're going to be disenfranchised from their
7 power to litigate by virtue of not having a class proof of
8 claim certified at this stage.

9 Now, having said that, it's entirely possibly that if
10 there's liability, again the universe may change. And at that
11 point it may be appropriate to take a look at a different class
12 issue and perhaps do something different from the unsecured
13 creditors. But I see no reason why this is anything other than
14 a typical unsecured claim that the Creditors Committee can
15 handle.

16 So I have to disagree. They've got the power.
17 They've got the professional fees in place. They certainly
18 have the power to retain experts, and I can't see how they're
19 losing rights in this process at this stage.

20 MR. SCOTT: Well, actually we have a disagreement
21 that any official Committee has the power to litigate the
22 claims of individuals who are members of that claim and Civil
23 Rule 23 is not discretionary in the 7000 rules, an adversary
24 proceeding, which is why the Lewis adversary proceeding was
25 filed. The dismissal of the Lewis adversary proceeding was

1 conditioned on a transfer and removal of cases which was the
2 position Grace took last time.

3 And so I understand what the Court is saying and I
4 started --

5 THE COURT: No, you don't, Mr. Scott, because I'm not
6 suggesting that the Unsecured Creditors Committee is going to
7 litigate a particular claim. But when you're looking at the
8 concept of whether the debtor bears liability based on some
9 scientific evidence to, when I use this word "class" I don't
10 mean for Rule 23 purposes --

11 MR. SCOTT: Sure.

12 THE COURT: -- but to a component of a creditor body,
13 a class of creditors in that sense. I don't see any reason why
14 the Unsecured Creditors Committee cannot handle that type of an
15 issue.

16 So I really don't see why a common issues trial
17 doesn't work first. But I see, as I said, if there is
18 liability, I think at that point in time there are some serious
19 issues with respect to class certification. But I think we're
20 putting the cart before the horse in this bankruptcy context.

21 MR. SCOTT: Well, I hope I at least helped the Court
22 in understanding what the issues are. I'm certain I haven't
23 helped the Court in resolving issues. And I guess these will
24 be formally presented at the next omnibus hearing.

25 THE COURT: All right.